

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN GERALD TRICE,

Defendant-Appellant.

UNPUBLISHED

August 26, 2008

No. 277293

Wayne Circuit Court

LC No. 06-011918-01

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ We affirm, but remand for correction of the judgment of sentence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions resulted from the shooting of Paul Green. Green confronted defendant and suggested that defendant had harassed Green's young niece. Defendant and Green argued, but ultimately, after Green's friend Richard Turner intervened, Green started to walk away from defendant. Defendant fired shots, and wounded Green in the back.

Defendant contended that he and Green argued, and that Green became hostile when defendant asked him to leave. Defendant saw Green's niece place a knife down next to Green.² Turner grabbed Green and tried to walk him away from defendant. However, Green turned around and moved toward defendant, threatening him. Defendant did not know if Green had the knife, or a gun, and defendant pulled his own gun out of his pocket. Defendant testified that he

¹ Defendant was charged with felony-firearm and two counts of assault with intent to commit murder, MCL 750.83. The trial court granted a directed verdict on one of the assault charges, and the jury could not reach a verdict on the other charge. Defendant subsequently pleaded guilty to the remaining assault charge. He was sentenced to five to 15 years in prison for assault with intent to commit murder, and to a consecutive two-year term for felony-firearm. This appeal concerns only defendant's felony-firearm conviction.

² He provided contradictory testimony as to whether he actually observed Green pick up the knife.

thought that Green saw the pistol and “I guess he tried to turn and run away. I was in motion at the time he was turning.” Defendant fired two shots at Green.

Defendant maintains that trial counsel provided ineffective assistance when counsel failed to challenge Green’s credibility with a previous conviction for larceny from a person. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is “limited to mistakes apparent on the record.” *Id.* Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

“Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Rockey, supra*. Here, trial counsel’s decision to not pursue Green’s prior conviction, and instead to focus on the testimony provided by the parties, particularly the testimony concerning Green’s aggressive demeanor and the uncertainty as to his intentions at the time right before the shooting, appears strategic. It also appears effective, in that counsel was able to cause the jury to doubt whether defendant possessed the requisite intent to commit an assault with intent to murder.

In addition, even if we were to find that defense counsel acted objectively unreasonably, defendant could not show that any error likely affected the outcome of his trial. The fact of Green’s prior conviction was revealed on cross-examination during the preliminary examination when Green admitted that he had been previously convicted of larceny from a person. However,

the circumstances of this offense are not discussed in the record.³ As a theft offense, Green's conviction was not automatically admissible. MRE 609(a)(2)(B). Thus, the trial court could have found that the evidence did not have "significant probative value on the issue of credibility" and excluded it.

Moreover, defendant's assertion that questioning Green regarding his prior conviction would have resulted in a different result is speculative. This was not, as defendant suggests, a simple credibility contest between defendant and Green. The remaining witnesses, including a neighbor's daughter who testified that she saw defendant shoot Green while he was walking away, generally supported Green's account of the shooting. No witness, including defendant, testified that Green had a weapon, or was threatening defendant with a weapon, at the time of the shooting. Under the circumstances, we cannot conclude that impeachment of the victim's testimony with evidence of his prior conviction would have been reasonably likely to change the verdict. Defendant has not established he was deprived of the effective assistance of counsel.

Defendant next argues that the trial court erred when it miscalculated the amount of jail credit to which defendant was entitled. He maintains that he is entitled to an additional 56 days of credit for time served. Plaintiff agrees with defendant's assertion. Defendant is correct. MCL 769.11b. We remand for correction of defendant's judgment of sentence to rectify this error.

We affirm defendant's conviction, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

³ Defendant contends that this conviction necessarily would have occurred within the previous ten years because Green was only 20 years old at the time of trial. However, defendant has provided no supporting documentation concerning Green's alleged conviction.